

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1391

3/28

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-1393

UNITED STATES OF AMERICA,
Plaintiff- Appellee
vs.

BERNARD J. WOODMANSEE, SR.
Defendant- Appellant

Appeal from the United States
District Court for the District of
Vermont in Criminal File No. 77-19-3

BRIEF OF DEFENDANT-APPELLANT
BERNARD J. WOODMANSEE, SR.

B
P/S

Duncan Frey Kilmartin, Esq.
Attorney for Defendant-Appellant
22 Third Street
Newport, Vermont 05855

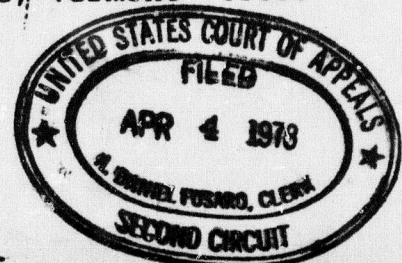


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STATEMENT OF ISSUES

1. Did the use of the "PROOF OF OFFICIAL RECORD" of Allan R. Miller, as the sole means of proving the bank funds for federally insured violate the confrontation clause of the Sixth Amendment?
2. Did Defendant-Appellant waive his right to make a confrontation argument on this appeal?
3. Did the District Court commit reversible error by admitting the FDIC's Record of Insurance for the Merchants Bank, White Street Branch?

STATEMENT OF THE CASE

Defendant-Appellant Bernard Woodmansee (hereinafter Defendant) was indicted in the United States District Court for the District of Vermont on two felony counts, as follows:

1. Unlawfully, willfully and knowingly receiving, possessing, concealing, storing, bartering, selling and disposing of money and other things of value exceeding \$100.00, knowing the same to have been taken and carried away with intent to steal and purloin from the care, custody, control, management and possession of the Merchants Bank White Street Branch, South Burlington, Vermont, the deposits of which were then insured by the Federal Deposit Insurance Corporation in violation of 18 USCA 2113 (c) and 2;

2. Conspiring with Joseph H. Dupaw, Anthony Persuitti, Bernard J. Woodmansee, Jr., Jeffrey Wall, Paul Caruso and Douglas J. Ferrier to commit an offense against the United States, to wit, to receive, possess, conceal, store, barter, sell and dispose of property and money and other things of value exceeding \$100.00, knowing the same to have been taken and carried away with intent to steal and purloin from the care, custody, control and possession of a bank in violation of 18 USCA 2113.

There was a jury trial on both counts. The jury convicted Defendant of both counts.

On September 14, 1977, Judge Holden sentenced Bernard Woodmansee, Sr. to six (6) years on the substantive count and five (5) years on the conspiracy count. The sentence on Counts

4 and 5 was to run concurrent with each other but was consecutive with the federal sentence of twelve (12) years which was then being served under the judgment of conviction in this court in CR No. 76-38-1.

Counsel for Defendant Woodmansee in this appeal served as trial counsel for Defendant Woodmansee and he has since the trial familiarized himself again with the proceedings against Defendant Woodmansee. Defendant Woodmansee, through his counsel, makes one essential claim of error in this appeal. The trial court committed reversible error against Defendant Woodmansee by improperly admitting evidence as to whether the Merchants Bank, White Street Branch, was federally insured on March 27, 1976 and May 1, 1976. It is the position of Defendant Woodmansee that the conduct of the Court constituted reversible error and that he is entitled either to a judgment of acquittal for failure of the government to establish an essential element of the case or, in the alternative, he is entitled to a new trial.

ARGUMENT

- I. THE INTRODUCTION OF THE "PROOF OF OFFICIAL RECORD", WITHOUT ANY WITNESS TAKING THE STAND VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT: SINCE THERE WAS NO OTHER EVIDENCE THAT THE FUNDS INVOLVED WERE FEDERALLY INSURED, THE GOVERNMENT FAILED TO PROVE AN ESSENTIAL ELEMENT OF THESE ALLEGED OFFENSES.

Defendant Woodmansee incorporates by reference the Brief of Defendant Joseph H. Dupaw and the arguments therein found on pages 5, 6, 7, 8, 9, and 10 of said Brief. Defendant Woodmansee says that the aforesaid arguments of Defendant Dupaw in regard to this issue are satisfactory and adequate and that further written argument by Defendant Woodmansee would be cumulative and unnecessary.

- II. THERE IS A PRESUMPTION AGAINST WAIVER OF A CONSTITUTIONAL RIGHT; DEFENDANT WOODMANSEE DID NOT, AT TRIAL, WAIVE HIS RIGHT TO ARGUE, ON APPEAL, THE VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION.

Defendant Woodmansee incorporates by reference the Brief of Defendant Joseph H. Dupaw and the arguments therein found on pages 10, 11, 12, and 13 of said Brief. Defendant Woodmansee says that the aforesaid arguments of Defendant Dupaw in regard to this issue are satisfactory and adequate and that further written argument by Defendant Woodmansee would be cumulative and unnecessary.

III. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY
ADMITTING THE FDIC'S RECORD OF INSURANCE FOR THE
MERCHANTS BANK.

Defendant Woodmansee incorporates by reference the Brief of Defendant Anthony Persuitti and the arguments therein found on pages 5, and 6 of said Brief. Defendant Woodmansee says that the aforesaid arguments of Defendant Persuitti in regard to this issue are satisfactory and adequate and that further written argument by Defendant Woodmansee would be cumulative and unnecessary.

CONCLUSION

For the reasons above stated and the arguments incorporated by reference from Defendants Dupaw and Persuitti's Briefs, the Court should set aside the verdict of guilty on both counts against Defendant Woodmansee and enter judgment of acquittal, or, in the alternative, should grant the Defendant Woodmansee a new trial on both counts.

ATTORNEY'S CERTIFICATE

The undersigned by his signature hereto certifies to the Second Circuit Court of Appeals the following:

1. I am an attorney admitted to practice before all state courts of Vermont and before the United States District Court for the District of Vermont.

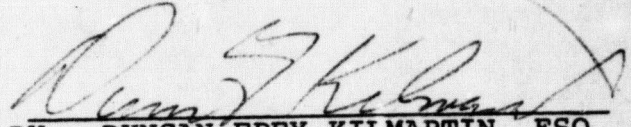
2. I have had nine (9) years of trial and appellate experience in criminal cases.

3. I served as trial counsel for Defendant Woodmansee in the instant case and in Cr. No. 76-38-1. I have served as appellant counsel in both cases.

4. I have carefully reviewed the trial record in Cr. 77-1393 (the trial record on which this appeal is based) and in my considered opinion, there are no other meritorious matters to be brought to the appellate court's attention, except as set forth above. I find no reasonable basis in the record or in my experience as the Defendant's trial counsel in the instant case for making further arguments as to matters constituting reversible error and I find no further reasonable basis for suggesting reversible error except as set forth in the foregoing Brief.

5. I have chosen not to extend or duplicate the briefing done by Defendants Persuitti and Dupaw because I would consider the same an unnecessary expenditure of time and attorney's fees and a duplication of effort which would give the court no further assistance in rendering a decision on the issues raised.

In certification of the foregoing I hereby affix my
signature on this 25th day of March, 1978,

A handwritten signature in dark ink, appearing to read "Duncan Frey Kilmartin", written over a horizontal line.

BY: DUNCAN FREY KILMARTIN, ESQ.
Attorney for Defendant Woodmansee

WAIVER OF ORAL ARGUMENT AND APPEARANCE

AT ORAL ARGUMENT

Unless specifically requested in writing by the Second Circuit Court of Appeals to appear at oral argument, Defendant Woodmansee waives oral argument and appearance thereat and says in support of this Waiver the following:

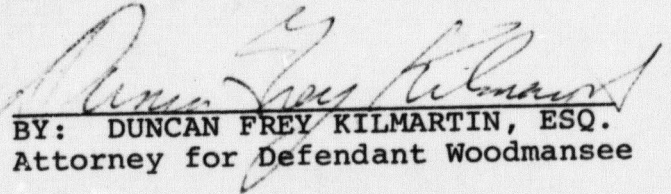
1. The issues raised by Defendant Woodmansee have been adequately briefed and it is the considered opinion of his counsel that oral argument on these issues will be of no assistance to the court in rendering a decision in view of the fact that counsel for Defendant Persuitti and/or Dupaw will be presenting oral argument on these same issues. Any oral argument to be presented by the undersigned would be unnecessarily cumulative of the oral arguments presented by other defense counsel.

2. It is the considered opinion of the undersigned that the cost and expense of appearing before the Court in New York City is unnecessary and is in fact a waste of CJA funds for reimbursement of assigned counsel.

DEFENDANT WOODMANSEE DOES NOT BY WAIVER OF ORAL ARGUMENT, WAIVE ANY RIGHTS WHICH HE HAS TO A DECISION ON THE MERITS OF HIS APPEAL.

Dated at Newport, Vermont, this 25th day of March, 1978.

Respectfully Submitted,


BY: DUNCAN FREY KILMARTIN, ESQ.
Attorney for Defendant Woodmansee

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 1978,
I served the foregoing Brief of Defendant-Appellee Woodmansee
upon:

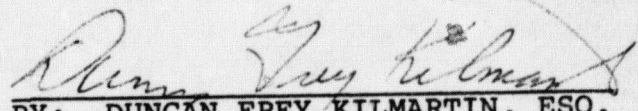
United States Court of Appeals (8 copies)
Second Circuit
United States Courthouse
Foley Square
New York, NY 10007

U.S. Attorney (2 copies)
District of Vermont
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Burlington, Vermont 05401

William C. Kittell, Esq. (2 copies)
Attorneys for Dupaw
5 Burlington Square
Burlington, VT 05402

John T. Sartore, Esq. (2 copies)
Attorney for Persuitti
135 College Street
Burlington, Vermont 05402

by mailing copies thereof indicated in brackets to them addressed
to their last known addresses, to wit, the addresses aforesaid
in properly sealed and stamped envelopes, by first class mail, and
posted the same in a proper receptacle of the United States Post
Office on the date aforesaid.


BY: DUNCAN FREY KILMARTIN, ESQ.
Attorney for Woodmansee, Sr.